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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 585

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners

vs.

CITY OF TALLAHASSEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. While the opinion of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, is not reported, a copy of the same is, however, included in the appendix hereto (Appendix C).

2. Upon conviction of the Petitioners in the Municipal Court of the City of Tallahassee, Florida, they erroneously filed an appeal in the Supreme Court of Florida. This improvident filing resulted in a transfer to the proper forum, viz, the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. The opinion of the Supreme Court of Florida in this transfer was reported in (Fla. 1961) 134 So2d 228 (Appendix D).

CERTIFICATES BELOW

After entering of the Order Affirming Judgments, by the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, the Petitioners attempted to file this cause in the District Court of Appeal of Florida, First District. The Certificate of the Clerk of this Florida Court is filed in the record below, appended herein, reflecting the pertinent and essential data of jurisdiction in these proceedings. (Appendix E)

JURISDICTION

Jurisdiction of this Court is invoked by petitioners under 28 U.S.C.A., §1257. Respondent respectfully quotes the appropriate clause therefrom:

> "Final judgments or decrees rendered by *the highest court of a state in which a decision could be had*, may be reviewed by the Supreme Court as follows:"

JURISDICTION OF THE CIRCUIT COURT OF THE STATE OF FLORIDA

The Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, which affirmed the judgment of the trial court in this cause, is, along with the other circuit courts, a primary trial court in Florida and has final appellate jurisdiction of all cases arising in municipal courts. No appellate proceedings lie in such cases from the Circuit Courts.[1] The Supreme Court and the District Courts of Appeal have express power to issue writs of certiorari, a common law writ which issues in the sound judicial discretion of the Court to inferior courts. Writs of certorari do not take the place of appeals, but cause the entire record of the inferior court to be brought up by certified copy, for inspection, in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law to the material injury of petitioner, or in cases where no direct appellate proceedings are provided by law. *Malone vs. The City of Quincy*, 66 Fla. 52, 62 So. 922; *Davis, et al, vs. Strople* (Fla. 1949) 39 So.2d 468.

The judgment of the Circuit Court under the Florida Constitution is not final, and the Circuit Court is not the highest court in this state from which a decision can be had. Judgments of Circuit Courts are reversible by the District Courts of Appeal and by Florida's Court of last resort, the Supreme Court of Florida, where it can be shown that the Circuit Court has not proceeded according to the essential requirements of law

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[1] Article V, Sections 1, 3, 4, 5, and 6, Constitution of the State of Florida, are set out in Appendix A, infra. Article V is the judiciary article of the Florida Constitution, entitled Judicial Department.

to the material injury of petitioner. The validity of city ordinances is frequently tested in Florida in this manner. *Hunt vs. The City of Jacksonville*, 34 Fla. 504, 16 So. 398; *Mernaugh vs. City of Orlando*, 41 Fla. 433, 27 So. 34; *Malone vs. City of Quincy*, 66 Fla. 52, 62 So. 922, *Dons, et al, vs. Strople* (Fla. 1949).39 So.2d 468.

If there is a discretionary review by a higher State Court, the exercise of such discretion must be invoked. *Stratton vs. Stratton*, 239 U.S. 55, *Matthews vs. Huwe*, 269 U.S. 262, 265-6.

The jurisdiction statute, permitting this Court to review State Court cases by certiorari, relates only to final judgments rendered "by the highest court of a state in which a decision could be had." 28 U.S.C. §1257. A decision, in this case, could have been had in the District Court of Appeal of Florida, First District *and* in the Florida Supreme Court by writ of certiorari.

Petitioners, for reasons not set forth in their brief, include in their Appendix A, the opinion entitled, *Israel Dresner et als, Appellants, v. City of Tallahassee, Appellee* (Fla. 1961) 134 So.2d 228. In order that this Court not be led to believe that this cause has already proceeded to the highest court of this State, it is appropriate here to show the attempt to lodge this case with the Florida Supreme Court in 1961. Appellants contended there and then that the trial Judge had passed directly on the validity of a state statute, and thereby moved the appellate jurisdiction of this cause to the Florida Supreme Court. That Court held this to be an erroneous assignment by appellants, and treated appellee's motion to dismiss the appeal as a motion to transfer an appeal improvidently invoked, pursuant to Rule 2.1(a)(5)(d) Florida Appellate Rules. (Appendix B) The Court stated flatly:

"Our opinion is not to be construed as in any fashion passing upon the merits of the appeal or the sufficiency of the

record, including the notice of appeal. These are matters to be disposed of by the circuit court in the exercise of its appellate jurisdiction." (134 So. 2d 228, 230).

Petitioners cannot circumvent the review of the District Court of Appeal of Florida, First District, and the Florida Supreme Court by improvidently lodging their cause in the highest court of a State and, when transferred to the proper court having jurisdiction, claim that the cause has already been there for review. Petitioners' statement (Brief—9) that "The Supreme Court of Florida ruled that it lacked jurisdiction to entertain the appeal . . ." is only a half-statement, and when read in the full light and context of the opinion (Appendix D) will reveal the true nature of the transfer by the Supreme Court of Florida to the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida. This language from Petitioners' brief is not fully revealing and leads this Court away from the improvident filing of this cause in the wrong court, and the transfer to the proper forum for appellate review. The essential requirements of law require that petitioners proceed according to the essential requirements of law.

Petitioners, fail to reveal to this Court that they later made an abortive attempt to proceed somewhat properly in this cause. They, on October 16, 1962, attempted to file in the District Court of Appeal of Florida, First District, their petition for writ of certiorari. This petition, arriving in the hands of the Clerk on October 16, 1962, one day late and absent the requisite filing fee, was then returned to the petitioners at their request. The certificate of the Clerk of this Florida District Court shows that even if accompanied by the filing fee, the earliest date of filing would have been the sixty-first (61st) day. Respondent hereby shows that Petitioners petition for writ of certiorari was then beyond the time allowed, and the District Court of Appeal was then and thereby without jurisdiction to

entertain the application, pursuant to Florida Appellate Rules (Appendix B) and applicable case law. *Harris v. Condermann*, (1959 Fla) 113 So. 2d 235.

The order of the Circuit Court, affirming the judgments herein sought to be reviewed, was entered on August 16, 1962, as shown in Petitioners' brief (Brief—2), under the "OPINIONS BELOW". On page 16 of Petitioners' Appendix B the date of this order of affirmance is not shown, but Respondent's Appendix C, the order affirming, clearly shows and thereby gives notice of the commencement of the time to begin review proceedings. "Within 60 days" as required by Florida Appellate Rule 4.5.c(1), when computed, made October 15, 1962 the last day that their petition could be "filed in the court". Rule 3.18, Florida Appellate Rules, (Appendix B), provides for the computation of time. October 15, 1962 is not a Saturday, Sunday or a legal holiday, nor is the period of time prescribed or allowed less than 7 days.

Respondent urges that Petitioners cannot circumvent the review of the higher courts of this State by delay and the allowance of prescriptive time to lapse. Again, Respondent says that the essential requirements of law require that Petitioners proceed according to the essential requirements of law.

Respondent urges on this court the fact that this cause is the third attempt to bypass the highest appellate courts of the State of Florida and to have this Court grant certiorari to the Circuit Court of the Second Judicial Circuit of Florida. See:

No. 783. LEONARD D. SPEED, Joseph Spagna and Johnny Herndon, Petitioners, v. CITY OF TALLAHASSEE, FLORIDA
356 US 913, 2 L Ed 2d 586, 78 S Ct. 670.
March 17, 1958. Petition for Writ of Certiorari to the

Circuit Court of Florida, Second Judicial Circuit, denied.

and

No. 671. HENRY M. STEELE, William Haywood Larkins, Patricia Gloria Stephens, Priscilla Gwendolyn Stephens, Angelina Nance, Barbara Joan Broxton, John Anglish Broxton and Clement Collier Carney, Petitioners, v. CITY OF TALLAHASSEE, Respondent, and ROBERT J. ARMSTRONG, Roland W. Eves, Derek Spencer Lawler and John J. Poland, Petitioners, v. CITY OF TALLAHASSEE, Respondent

365 US 834, 81 S Ct 748, 5 L Ed 2d 745

March 6, 1961. Petition for Writ of Certiorari to the Circuit Court of Florida, Second Judicial Circuit, denied.

Mr. Justice Harlan in *Garner v. Louisiana* 368 U.S. 157, 7 L, Ed. 2d 207, 82 S. Ct. 348 (1961) in referring to *Thompson v. Louisville*, 362 U.S., 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960) says:

> "Thompson v. Louisville should be recognized for what it is, a case involving a situation which, I think it fair to say, was unique in the annals of the Court. The case is bound to lead us into treacherous territory, unless we apply its teaching with utmost circumspection, and with due sense of the limitations upon our reviewing authority." (7 L.Ed. 2d 207, 230-1)

What more can be said of Petitioners who have failed to exhaust their state remedies, have had no final judgment or decree rendered by the highest court of this state in which a decision could be had, has improvidently lodged its appeal in the wrong court of a state, and has allowed its time to expire for petition for certiorari in the proper state courts. To ask this Court for review is to ask it to take jurisdiction after Petitioners are in default below.

It is, therefore, respectfully submitted that until the Petitioners have exhausted their state remedies by seeking review of

the judgment of affirmance entered by the Circuit Court of Leon County, Florida, by *first* the District Court of Appeal of Florida, First District and *second* by the court of last resort of the State of Florida, namely, the Supreme Court of Florida, then under the provisions of 28 U.S.C. §1257, this Court will not entertain this petition for certiorari.

QUESTIONS PRESENTED

1. Where ten persons assemble together pursuant to a prearranged concert, even though such place of assembly be within a public transportation facility, and demonstrate to protest an imagined or fancied discrimination against them in such fashion as to inspire well-grounded fear in persons of reasonable courage in the community to fear that there would be breaches of the peace and that they would excite alarm and fear, may not municipal officials under provisions of law permitting them to order the dispersal of an unlawful assembly, order those assembled to disperse, and upon failure to disperse to arrest them?

2. Where ten persons purchase airline tickets, but pursue a program of cancelling reservations within minutes of plane departure time, which automatically cancels the tickets also, and they do this over an extended period of time, thereby disrupting the orderly operation of franchised and licensed airlines and the probable denial of the space to other would-be travellers, may they then say that they are *bona fide* passengers in interstate commerce and avail themselves of the protections of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C.A. §1301 et seq.)

Respondent urges Question 1 be answered affirmatively; that Question 2 be answered negatively.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent does not believe that any Federal constitutional questions are involved, and contends that the petition for certiorari would have this Court sift through evidence presented to a trial court and determine whether or not the acts of Petitioners were sufficient to sustain the convictions by the Municipal Court of the Respondent city.

Respondent believes that this petition is merely an attempt to obtain another hearing after being defeated in the trial court below.

STATEMENT OF THE CASE

Petitioners, a group of clergymen from Connecticut, New York, New Jersey and Massachusetts, and representative of several races and religious denominations, met together at Washington, D.C. for the purpose of participating in what was then currently known as a "freedom ride," or at least the participants were called "Freedom Riders." Their avowed objective was to test the segregation and/or integration aspects of facilities afforded them in several cities in the southeastern states, one of which was Tallahassee, Florida.

Petitioners travelled by Greyhound Bus from a point of departure in Washington, D. C., to terminate in Tallahassee, Florida, and were to return north via Eastern Air Lines.

Petitioners, and other members of their party, arrived at Tallahassee Greyhound Bus Terminal about 11:30 A.M., June 15, 1961, pursuant to advance information and publicity. In anticipation of the circumstances herein calculated to excite alarm in this community and the danger to the tranquility and peace of the neighborhood, sufficient protection was provided at this bus

station in the form of city police, highway patrolmen, sheriff's office and sheriff's bureau representatives. A large crowd gathered shortly after the arrival of the freedom rider group and in the opinion of the City Attorney, there was the possibility of danger to the peace and tranquility of the neighborhood at that time. The crowd was ordered to disperse, and it did; the Petitioners ate and finished eating about 2:20 P.M. and departed to the municipal airport to enplane according to their reservations at 3:25 P.M.

At this point, it seems appropriate to call to the attention of this Court that the initial group of these so-called "Freedom Riders" was eighteen in number and that eight of them departed Tallahassee as pre-arranged. The remaining ten (Petitioners here), construing that they had been denied entrance to the Tallahassee airport restaurant, cancelled their existing airline reservations and remained to be served at a time when the restaurant would re-open.

Finding the airport restaurant closed for repairs, these Petitioners elected to stay in the vicinity of this restaurant until it should open. Repairs were not completed immediately, in fact were not completed for several days, during part of which time these Petitioners continued to remain in the adjacent airport waiting room, making and cancelling airline reservations on the following schedule:

(a) June, 15, 1961, Thursday, Eastern Air Lines Flight #268 to leave Tallahassee 3:45 P.M. All eighteen (18) freedom riders ticketed and confirmed. Petitioners held tickets, but cancelled prior to departure.

(b) June 16, 1961, Friday, Eastern Air Lines Flight #954 to leave Tallahassee 8:38 A.M., this space requested the previous day after 3:45 P.M. Confirmed as to all

appellants at 8:35 P.M. on the 15th. Petitioners would not surrender tickets for correct ticketing. They cancelled their reservations at 8:15 A.M., June 16, 1961, prior to departure of the flight at 8:38 A.M.

(c) June 16, 1961, Friday, National Air Lines Flight #362 to leave Tallahassee 1:49 P.M., confirmed as to all appellants at 8:20 A.M. Petitioners *not* ticketed and cancelled their reservations about 12:00 Noon.

In summation it can be seen that Petitioners, during the dates of June 15 and 16, 1961, held cancelled tickets on Eastern Air Lines departing Tallahassee to New York or Newark, New Jersey. They cancelled Eastern Air Lines Flight #268 on the 15th just prior to departure, and they cancelled Eastern Air Lines Flight #954 fifteen minutes prior to departure. Their tickets were automatically cancelled when their reservations were cancelled for a particular flight. Petitioners *held no tickets* on National Air Lines.

Petitioners continued to occupy the airport waiting room facilities under the protection of the law enforcement agencies of the City, Leon County and the State. This protection was requested and given. At near midnight on the 15th of June, 1961, the airport was closed and the Petitioners returned to Tallahassee under police protection which they had requested, to spend the night, returning to the airport early the next morning, ostensibly to board Eastern Air Line's Flight #954 departing at 8:38 A.M. The restaurant was still closed for repairs. Petitioners state that they were denied entrance to the restaurant facility, but this was no denial to them; in fact, there were no persons admitted to this restaurant during the period. It was closed to all persons.

As the morning of June 16, 1961 progressed, it became apparent to persons of long and comprehensive experience in

the law enforcement field, that the continued activity of the Petitioners in the airport waiting room was tending to create a disturbance or incite a riot or disorderly conduct.

On June 16, 1961, at approximately 12:20 P.M., James Messer, Jr., a Special Police Officer of the City of Tallahassee, informed the Petitioners that their assembly would tend to create a disturbance or incite a riot or disorderly conduct, and, therefore, he commanded them to immediately and peaceably disperse. They refused to obey the order. After being assured that his command had been heard by those assembled, and when it became obvious that they did not intend to comply with the command, they were placed under arrest.

During the entire period while Petitioners were in Tallahassee, they were adequately protected from any hostile acts by any person or persons. However, they arrived in this City with the avowed purpose to "test" imaginary or imagined discriminatory acts or practices, and they had a common intent to attain this purpose, whether the same was done lawfully or unlawfully. Respondent holds, and urges, that the same was done in such a manner as to cause sane, firm and courageous persons in this community to apprehend a breach of the peace.

The Petitioners were charged as follows:

"BEFORE ME, JOHN A. RUDD, Judge of the Municipal Court of the City of Tallahassee, Florida, personally appeared JAMES MESSER, JR. and EDW. J. HILL, who being duly sworn, say that on, to-wit: the 16th day of June, 1961, upon property owned and operated by the City of Tallahassee, Florida, and located in Leon County, Florida, namely, the Tallahassee Municipal Airport, ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR.,

RALPH L. ROY, CHAS. A. HUNTER, JOHN J. POLAND, JR., and PRISCILLA G. STEPHENS: COUNT I, Did then and there unlawfully assemble in that they did, and they being more than three (3) persons, meet together to commit a breach of the peace, acting together and concertedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage of riot, or other breaches of public peace, and while so unlawfully assembled a police officer of said City did go among these persons so assembled, and making himself known to them and each of them, did in the name of the State and City, command those so unlawfully assembled to immediately and peaceably disperse, and they and each of them did then and there refuse and/or neglect to obey such command when given, contrary to the laws and ordinances of said City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida."[2]

At the trial on the charges as set forth, the Municipal Court of the City of Tallahassee, Florida, found petitioners guilty of unlawful assembly as charged. They, and each of them, were sentenced to pay a fine of $500.00 or in the alternative to serve sixty (60) days in the City Jail. Petitioners erroneously filed an appeal in the Supreme Court of Florida which was transferred to the proper court for appellate review, viz: The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, the said court having appellate jurisdiction of appeals from Municipal Courts in Florida. This Circuit Court affirmed the judgment of conviction of the trial court below.

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[2] Chas. A. Hunter, John J. Poland, Jr., and Priscilla G. Stephens are not petitioners here.

Thereupon, petitioners attempted to file for certiorari in the District Court of Appeal of Florida, First District. This petition, filed late, was returned to petitioners upon request.

They now seek review here.

ARGUMENT

1. Certiorari is not granted to review facts.

The decisions of the Court below are correct and there is no basis for further review. As this Court stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston* 268 U.S. 220, 227. Certiorari is not granted "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163.

2. The petitioners were arrested and convicted of the offense of unlawful assembly.

Meetings attended with circumstances calculated to excite alarm are unlawful. *Regina v. Neal*, 9 Carrington and Payne (English) 431.

Meetings assembled under circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquility and peace of a neighborhood are unlawful assemblies. *Regina v. Vincent*, 9 Carrington and Payne (English) 91.

At common law, assemblies may become unlawful alone by the manner of them, as by such circumstances of terror as tend to endanger the public peace and excite fear, alarm, and consternation among the people. There need be no common pur-

pose except as might be implied by assembling in such manner, and which might be either lawful or unlawful. *State v. Butterworth*, (N. J.) 139 Atlantic 161.

Assemblies of the requisite number of persons who conduct themselves so as to cause persons in the neighborhood to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultously, are unlawful. *Aron v. City of Wausau*, 74 N. W. 354, 98 Wis. 592, 40 L.R.A. 733.

Assemblies that contemplate injury to the rights of others are held unlawful. *Ex parte Jacobson*, 115 S.W. 1193, 55 Tex. Cr. R, 237.

In *Lair v. State* (Okla) 316 P. 2d 225 the Court noted that no civilized government could permit the practice of unlawful assemblies (referring specifically in the opinion to the practice of gentry on bad terms with each other going at each other with bands of armed retainers), the consequence being that the bands would probably fight, and certainly the people would fear that they would fight. The court further noted it was immaterial whether the object which those assembled had in view was lawful or unlawful if the intent were to affect the object of the assembly in such manner as to give firm and courageous persons in the neighborhood ground to apprehend a breach of the peace in consequence of it. (Citing 91 C.J.S. Unlawful Assembly §29, b, p. 496; *State v. Woolman* 84 Utah 23, 33 P. 2d 640, 93 A.L.R. 723; *State v. Butterworth* 142 A. 57)

3. The Respondent distinguishes *Taylor v. Louisiana* 370 U.S. 154, 8 L.Ed. 2d 395, 82 S.Ct. 1188 by quoting directly from Petitioners' Brief (p. 11) where they said "————where proof showed only the entry of a Negro into a white waiting room at an interstate transportation facility." Citing further from *Taylor*, this Court said: "The trial court said, however,

that the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the peace." (8 L.Ed. 2d 395, 397) Petitioners in this cause were not arrested merely for their *presence*, but for unlawful assembly. Unlawful assembly, by statute and by definition, arises when persons are unlawfully assembled or when a lawful assembly becomes unlawful, under such circumstances as to cause, or inspire, a well-grounded fear in persons of reasonable courage in the community that there would be a breach of the peace or the creation of a disturbance. In *Taylor* we find merely restless persons and onlookers climbing onto seats to get a better view. This is not the instant case.

4. In *Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624 (1960) Respondent distinguishes from the instant case because this Court found (4 L.Ed. 2d 654, 657) "———— police court fines of less than $20.00 on a single charge are not appealable or otherwise reviewable in any other Kentucky court ————." This Court is familiar with *Thompson*, in full, and the manner in which it proceeded through the Kentucky court system, and finally deciding that Thompson's fines were not appealable and would be satisfied by his serving the requisite time in jail, all before he could prepare and file his petition for certiorari. Petitioners here have not sought, nor do they now seek, the exhaustion of state remedies afforded them in the Florida courts and required of them by this Court before being reviewed herein. (28 U.S.C., §1257)

5. Petitioners cite *Morgan v. Virginia*, 328 U.S. 373, 90 L. Ed. 1317, 55 S.Ct. 1050 (1946) *Edwards v. California*, 314 U.S. 160, 86 L.Ed. 119, 62 S.Ct. 164 (1941) and *Boynton v. Virginia*, 364 U.S. 454, 5 L.Ed. 2d 206, 81 S.Ct. 182 (1960) in that arrests and convictions of those certain Petitioners constitute an undue burden on passengers of interstate commerce in violation

of the Interstate Commerce clause (Article I, Section 8, Clause 3) of the United States Constitution under principles announced by this Court in these above cases. Respondent contends that Petitioners herein were not passengers in interstate commerce. In the event that this record suggests that these Petitioners were, at any one time, passengers in interstate commerce, Respondent urges that at the time of their arrest, they were then and there *not* passengers in interstate commerce, and the overall pattern of the activity, herein specified to be an unlawful assembly, indicates that any attempt to claim that they were passengers in interstate commerce constitutes and constituted a sham. Such sham claims are not sufficient grounds for this Court to grant certiorari. In *Boynton v. Virginia,* Mr. Justice Black, in delivering the opinion of this Court, says in his lead paragraph: (5 L.Ed. 2d 206, 208) "The basic question presented in this case is whether an interstate bus passenger is denied a federal statutory or constitutional right———." This establishes the interstate passenger aspect of the Petitioner Boynton but no such showing is created in this record. Respondent respectfully calls attention to the schedule of making and breaking of reservations shown herein. In *Boynton,* Petitioner was instructed to leave the white portion of the restaurant and was advised that he could be served in the colored portion, whereas, in the instant case, Petitioners were not denied service purely on the basis of the color of any of them, as the restaurant was closed to all persons and no denial, per se, was created or experienced. Again, in *Boynton,* Petitioner exhausted his state remedies by appealing his cause to the Virginia Supreme Court. This Court says that "We granted certiorari because of the serious federal questions raised concerning discrimination based on color." (5 L.Ed. 2d 206, 209) Petitioners in this cause are both white and colored and there was no discrimination based on color.

6. Petitioners' Brief (p. 13) states that they are deprived of one of the basic privileges and immunities of federal citizenship,

namely, the right to travel throughout the nation free of unreasonable restraint imposed by the states and unfettered by unlawful arrest; however, the leading case of *Crandall v. Nevada* (73 U.S. 35, 18 L.Ed. 745 (1868) relates to the State of Nevada imposing a tax for each and every person conveyed or transported from the State. This court held that all of the citizens of the United States are members of the same community and must have the right to pass and repass through every part of it without interruption, as freely as in their own states. Respondent fails to see the correlation or connection between taxing interstate commerce passengers in one state and the unlawful assembly of persons within the limits of a given state under the conditions set forth herein.

7. Petitioners seek comfort in *Garner v. Louisiana,* 368 U.S. 157, 7 L.Ed. 2d 207, 82 S.Ct. 248 (1961) relating to (1) a sit-in demonstration, (2) Louisiana's unlawful assembly statute, (3) Negroes sitting at white lunch counters, (4) refusal of the Negroes to move upon orders, (5) testimony by the State that Petitioners "were disturbing the peace by sitting there." This Court held that it found "———the record barren of any evidence that would support a finding that the petitioners' conduct would even 'foreseeably' have disurbed the public, ———"; (7 L.Ed 2d 207, 215) where in the instant case, the statutory requisite number of persons did meet together, did excite alarm, did endanger the public peace, did excite fear, all and in such nature as to inspire *well-grounded* fear in persons of reasonable courage, of riot, or other breaches of the peace, and the record here is *not barren* of these findings.

Mr. Justice Harlan concurred in this reversal of convictions, due to "implied consent of the management." (7 L.Ed. 2d 207, 234) He said the Petitioners' (Garner and Hoston) conduct could not be punished under the state's *general* breach of the peace statute, and all three Petitioners' convictions must fall

because Louisiana's statute was vague and uncertain, so much as to be unconstitutional. This vagueness and uncertainty cannot apply to the instant case.

Mr. Justice Douglass concurred in the reversal of all convictions, referring in his opinion to policies of segregation. Segregation is not the problem here, as is seen from the record. This is unlawful assembly. Using the terms of the common man, these petitioners were served on an integrated basis in the restaurants wherever they went (even the local bus station restaurant); but in the final demonstration against the imaginary aggrievement of a closed restaurant, they never were able to show anyone that there was discrimination, and the record is devoid of such evidence. Further, these instant Petitioners were not all Negroes, all of one religion, of one height, shape or weight. This is an heterogeneous assembly of persons, unlawfully assembled according to all unlawful assembly concepts, convicted with adequate evidence of guilt, with a fair and public trial; and finally appealed to the next state court of review, and affirmed. The announced purpose of Petitioners' trip failed at the leased airport restaurant in Tallahassee, finding it neither "integrated," nor "segregated," but closed for repairs to all persons, and over an extended period of time.

8. Judge Ben C. Willis, Circuit Judge, in affirming the trial court in these convictions, says these facts "——— squarely present the question as to whether or not the conduct of the appellants (Petitioners) was an exercise by them of rights they hold under state and federal constitutional provisions which would preclude their prosecution, conviction and sentence for unlawful assembly ———." Judge Willis asks the question, may not a lawful assembly become an unlawful assembly when pursued to unreasonable lengths that impose unreasonable burdens on others, *after the lawful objectives* have been fairly accomplished. Judge Willis' opinion states that he deemed the

sole purpose of these Petitioners to be a course of harrassment, to goad the municipality and its restaurant lessee to open the restaurant and gratify their wishes that they be served in a particular style, not reflected by the record, but apparently deemed to be their right. The record is absent the ability of the municipality or the restaurant lessee to open the restaurant had they so desired. Petitioners might have rightly assumed that the restaurant would eventually be opened to them and to the public again, at which they could lawfully assemble and their desires be gratified.

The local activity of these Petitioners, in Tallahassee, followed closely on the heels of other so-called "Freedom Rider" groups in other parts of this country. The consequences of some of these so-called "rides" is well known. Justice Field, who wrote the opinion in *Beatty v. Gillbanks* 47 L.T. Rep. N.S. 194, 15 Cox C.C. 138, 9 Q.B. 308 (1882) said:

> "Now, without doubt, as a general rule it must be taken that every person intends what are the natural and necessary consequences of his own acts, and if in the present case it had been their intention, or if it had been the natural and necessary consequence of their acts, to produce the disturbance of the peace which occurred, then the Appellants would have been responsible for it, and the magistrates would have been right in binding them over to keep the peace." (15 Cox C.C. 138, 145)

We hold herein, and pursuant to the opinion just recited, that these Petitioners knew of the consequences of their acts, knew of the excitement and alarm that would be attendant to their further activity, and though their assembly at one time may have been lawful, and fully protected by Respondent, the continued activity as set forth in this record reveals that the assembly became unlawful and it was the duty and responsibility pursuant to the opinion of those persons charged with said responsibility that such assembly be dispersed.

The concerted action of these Petitioners, as reflected by this record, indicates a desire on their part to remake the law according to their own desires, spurred on by imaginary discriminations. Quoting from the opinion in *The Oakmar*, D. C., 20 F. Supp. 650 (1937), the Court said about those persons who desire to make over the law:

> "They (such theories) emanate from those persons who lack that self-control which enables men to abide the slower processes of orderly government instead of yielding to that impatience which, if not restrained, will ultimately destroy the fundamental rules for human freedom upon which our form of government is based."

Citing again from the opinion by Judge Willis, (Appendix C) he says;

> "Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government."

9. *Burton v. Wilmington Parking Authority* 365 U.S. 715, 6 L.Ed. 2d 45, 81 S.Ct. 856, (1961), is distinguished from the instant case because Burton was "refused—food or drink solely because he is a Negro," and the Supreme Court of Delaware held that lessee (restaurant) was acting within the contemplations of an applicable Delaware statute denominating lessee as not being "required (under Delaware law) to serve any and all persons entering its place of business." (6 L.Ed. 2d 45, 47) The Supreme Court of Delaware dismissed the appeal; hence the writ issued by this Court. Further, the *Wilmington Parking Authority* had power to determine the rates and charges for the services provided by the facility.

Again, arguendo, Appellant Burton had exhausted his state remedies before seeking appeal or certiorari, contra to Petitioners

here seeking to circumvent all higher Florida courts. Respondent here exercises no price, rate or charge jurisdiction, or control over the lessee involved in the instant case, "determined exclusively" as did the *Wilmington Parking Authority*.

Finally, no Florida statute or legal pronouncement is in this record that in anywise parallels the Delaware law (24 Delaware Code, Section 1501) upon which any refusal of service herein was relied.

10. Petitioners seek comfort in *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886) which case seems to appear in all briefs where there are persons of mixed races involved in litigation. However, the facts in *Yick Wo* that were admitted into the record of that case were enough to allow a Court to see:

> "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons." 118 U.S. 356, 366. (Parenthesis supplied)

In the instant case, we have no ordinance, no state statute, no exercise of power on the part of the City of Tallahassee to in anywise exercise control over the restaurant sought to be entered by Petitioners.

CONCLUSION

It is respectfully submitted that the decision of the Court below in the case of City of Tallahassee v. Israel Dresner, Austin M. Warner, Robert M. Brown, Petty D. McKinney, Martin Freedman, Arthur L. Hardge, Robert J. Stone, Wayne C. Hartmire, J. W. Collier, Jr. and Ralph L. Roy is correct; there is no conflict of decisions and no basis for further review, as stated in the foregoing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief in Opposition to Petition For Certiorari has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served by air mail upon Tobias Simon, Esquire, and Howard W. Dixon, Esquire, counsel for Petitioners, at 706 Ainsley Building, Miami 32, Florida, this 4th day of December, A. D. 1962.

James Messer, Jr.
of Counsel for Respondent

APPENDIX A

ARTICLE V. JUDICIAL DEPARTMENT

§ 1. Courts

Section 1. The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish. [Adopted general election, Nov. 6, 1956.]

§ 3. Practice and Procedure

Section 3. The practice and procedure in all courts shall be governed by rules adopted by the supreme court. [Adopted general election Nov. 6, 1956.]

§ 4. Supreme Court

Section 4. (1) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(2) *Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review

by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto where a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

§ 5. District Courts of Appeal

Section 5. (1) *Appellate Districts.* The state shall be divided into three appellate districts of contiguous counties as the legislature may prescribe, and there shall be organized a district court of appeal in each district.

(3) *Jurisdiction.* Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

§ 6. Circuit Courts

Section 6. (3) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court or before county judges' courts, of all misdemeanors tried in criminal courts of records, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extraterritorial jurisdiction in chancery cases as may be prescribed by law.

APPENDIX B

FLORIDA APPELLATE RULES

Rule 2.1. THE SUPREME COURT

a.(5) Jurisdiction of the Supreme Court

(d) When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction. Five days notice of such motion or proposed action shall be given to the other parties. Notices of appeal and other papers filed prior to the transfer shall have the same force and effect as if filed in the proper court and as of the time when filed in the court from which the transfer was made.

Rule 2.2 DISTRICT COURTS OF APPEAL

b. Clerk

(6) Filing Fee. In all appeals, and in all cases originating in the court, the clerk shall require the payment of twenty-five dollars at the time the certified copy of the notice of appeal, petition, or other initial pleading is filed; provided that such payment shall not be exacted in advance in criminal appeals in which the defendant has been adjudicated insolvent for the purpose of an appeal, or in appeals where the State of Florida is the real party in interest as the moving party, provided further, that the payment of such fee or any costs shall not be required in habeas corpus proceedings or appeals therefrom, arising out of or in connection with criminal causes or convictions.

Rule 3.18 COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run is not to be included. The last day of the period so computed shall be counted, unless it is a Saturday, Sunday or a legal holiday, in which event the period shall run until the end of a next day which is neither a Saturday, Sunday nor a legal holiday. When the period of time prescribed or allowed shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as any other day and not as a holiday. If an act be required to be performed on a day certain and such day fall on a Saturday, Sunday or legal holiday, the act shall be performed on the next day which is neither a Saturday, Sunday, nor a legal holiday.

Rule 4.5 EXTRAORDINARY WRITS: MANDAMUS, CERTIORARI, PROHIBITION, QUO WARRANTO, HABEAS CORPUS, AND STAY WRITS

c. Certiorari

(1) Petition to Be Supported by Transcript and Brief. Application for writ of certiorari shall be by petition filed in the Court within 60 days from the rendition of the decision, order, judgment or decree sought to be reviewed. Unless otherwise ordered by the Court, it shall be accompanied by a certified transcript of the record of the proceedings the petitioner seeks to have reviewed or so much thereof as is essential. Unless shown by the respondent or his attorney to be necessary, no other record shall be required. The petition shall contain a concise statement of the cause and the reasons relied on for granting the writ. It shall be accompanied by a supporting brief prepared as provided by Rule 3.7.

APPENDIX C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA. AT LAW.
NO. 10084

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ROBERT J. STONE, ARTHUR L. HARDGE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH LORD ROY,

Appellants,

vs.

CITY OF TALLAHASSEE,

Appellee.

ORDER AFFIRMING JUDGMENTS

This is an appeal from convictions in the Municipal Court of the City of Tallahassee, Florida of the ten appellants named in the caption who were charged with unlawful assembly. A fine was assessed against each of them with an alternate jail sentence.

The formal charge is in a single count naming the ten appellants and three others* as defendants and alleges an unlawful assembly on June 16, 1961 "in that, they being more than three (3) persons, met together to commit a breach of the peace, acting together and concertedly to occupy and continuously oc-

* Of these three one was acquitted and the other two were granted a nolle prosequi.

cupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled" were commanded by a police officer of the city, after identifying himself as such, to immediately and peaceably disperse, and they refused or neglected to do so.

The appellants contend that the judgments pursuant to convictions violate their rights guaranteed by the Florida and United States Constitutions in that they have been denied the equal protection of the laws and have been deprived of liberty or property without due process of law. They contend that the state statute, Chap. 61-237, Laws of 1961, (F. S. 870.04), (which, by reference adoption in a municipal ordinance,* is made an ordinance of the City of Tallahassee) is unconstitutional and void, either on its face or as it has been applied to the appellants in this case.

The pertinent portions of the statute, adopted as an ordinance, are:

> "If any number of persons ——— are unlawfully, riotously or tumultuously assembled in any ——— city or municipality ——— any ——— police officer of said city or municipality ——— shall go among the persons so assembled ——— and shall, in the name of the state

* Sec. 23-38, Tallahassee Code, provides that it shall be unlawful for any person to commit any act which is or shall be recognized by the laws of the state as a misdemeanor. The penalty is a maximum fine of $500.00 or 60 days imprisonment or both.

command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said [officer] shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present ——— when required by such [officer] to depart from the place, refuses or neglects to do so, he shall be deemed one of ——— the persons unlawfully assembled and may be prosecuted and punished accordingly."

The facts in the case are not in dispute and squarely present the question as to whether or not the conduct of the appellants was an exercise by them of rights they hold under state and federal constitutional provisions, which would preclude their prosecution, conviction and sentence for unlawful assembly in the trial court.

The appellants are clergymen, two being rabbis and the others being ordained ministers of several Protestant denominations. They are residents of New Jersey, New York, Massachusetts or Connecticut. Some of them are of the white race and some are negroes. About June 12 or 13, 1961 they, together with eight other clergymen from the same general area, departed from Washington, D. C. by interstate common carrier bus for a so-called "Freedom Ride" into Virginia, the Carolinas, Georgia, and Florida. The bus ride terminated in Tallahassee June 15, 1961. The "Freedom Riders" left their buses at the Greyhound bus terminal there and went into the terminal lunch room to obtain food which was served them.

This trip was sponsored and at least partially financed by an organization known as C O R E (Congress on Racial Equality) which has been aggressive in promoting racial integration and desegregation. The trip was well publicized, having been given wide coverage in all news media including radio and television. The time and place of arrival in Tallahassee was heralded and well known.

The purposes of the "Freedom Ride," as stated by appellant Collier, who was the spokesman for the group, were two-fold: (1) To ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which they would pass; and (2) To bear witness as ministers, rabbis and clergymen to the struggle to obtain those rights "guaranteed us by the Constitution."

Shortly prior to the time the buses bearing the "Freedom Riders" were scheduled to arrive at about noon on June 15, there had gathered in the vicinity of the bus station a number of persons and groups of persons. Law enforcement officers, including city police, had been dispatched to the area to prevent any disturbance. It was suspected that resentment against the "Freedom Riders" might result in some attempts at violence toward them or precipitate other disorders. When the buses arrived, law enforcement personnel moved in and gave protection to the passengers as they left the bus and entered the lunch room in the terminal. Apparently they were served in the lunch room under circumstances and policies satisfactory to them.

In approximately an hour after arrival at the bus terminal the eighteen "Freedom Riders" proceeded to the Tallahassee Municipal Airport ostensibly for the purpose of boarding a 3:25 P.M. Eastern Air Lines plane for passage to Washington, Newark, or New York. They were transported to the airport in private cars presumably furnished by local sympathizers with their objectives.

Upon arrival at the airport they found that the restaurant there had been closed. When the time approached for arrival of the 3:25 plane the ten appellants cancelled the reservation they had previously made for the flight. The other eight boarded the

plane when it arrived and departed for their destinations in the East.

At that time, the airport arrangement provided separate waiting rooms, or areas, for white and negro; also separate rest rooms; and separate areas for serving food, the white area being a glassed-in place and the negro consisting of a counter with several stools. However, as mentioned before, the eating service had been discontinued by the closing of the restaurant facilities. A sandwich vending machine was in the lobby, but the prices on same had been marked up from previous prices.

The appellants stayed together in a more or less compact group in the lobby area most of the time and no attempt was made to enforce separation of the races in the waiting room. Rest rooms were used by them without observing the designation of the segregated facilities.

After cancelling their reservations for the 3:25 P. M. flight they sought and ultimately obtained reservations for a flight the next morning at 8:25 on an E.A.L. plane. They remained in the airport until about 11:00 P. M. that evening for the purpose of observing if the restaurant would open and service be granted to them. The restaurant remained closed.

Law enforcement officers, including city police, were detailed to keep order. The activities and objectives of the appellants had been the subject of news reporting and groups of people were seen to be gathering or attempting to gather in the vicinity of the airport. There were critical and hostile comments made about the appellants. The police turned away some of those gathering when it was apparent such persons had no airport business or interest. Persons were even screened at the entrance and turned away by officers if they had no business to transact at the airport.

The chief of police advised the appellants that the airport ter-

minal would close for the night at approximately 11:45 P. M. and a spokesman for appellants requested protection as they moved from the airport into the city and also on the return to the airport the next morning. Such protection by escort of law enforcement officers was provided.

The appellants thus left the airport at about 11:00 P. M. on the 15th to return the next morning prior to the scheduled departure at 8:25 A. M. of the plane on which they had obtained reservations. They were given escort security protection on both the occasions of leaving and returning to the terminal.

The restaurant was also closed on the morning of June 16. At 8:15 A. M. all ten of the appellants cancelled their reservations for the 8:25 flight and remained in the waiting room after that flight had departed. At 8:20 A. M. they sought, and ultimately obtained, reservations on a National Airlines flight scheduled to depart at 1:47 P. M. that day, but cancelled just prior to noon.

During these periods there continued to be movements and gathering of groups of people in cars and there was a hostility and open resentment against the conduct and attitudes of the appellants. A considerable number of police, sheriff's deputies and highway patrolmen had been detailed to prevent disorder. City, county and state officials, including the Governor, were apprehensive and moved to provide necessary law enforcement personnel to preserve order.

At about 12:15 P. M., Mr. James Messer, Jr., city attorney of Tallahassee and a special police officer of the city, after conferring with the mayor and chief of police of the city, approached the appellants who were together and inquired if there was a leader of the group. Appellant Collier arose and identified himself and assumed to act as spokesman. Mr. Messer identified him-

self and his official positions, exhibiting his police badge. Others in the group gathered around Mr. Messer and Rev. Collier and Mr. Messer read to them a proclamation. He stated that the assembly of the appellants at the Municipal Airport of Tallahassee will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee at its Municipal Airport over which the city had jurisdiction. He mentioned incidents of the previous night and fears of more unrest. He then commanded them in the name of the state and city to immediately and peaceably disperse, and explained that such meant from the airport property. He then added that failure to so disperse would result in arrest for unlawful assembly. Collier asserted that they were interstate passengers, to which Messer replied that he did not consider them to be bona fide passengers in view of their reservation cancellations.

Several local sympathizers with the appellants dispersed, but appellants failed to do so. After about 1½ minutes, Mr. Messer turned to the Chief of Police and remarked "Chief, you can carry out your orders." The appellants were arrested and taken into custody.

The appellants take the view that the segregation practices with regard to waiting rooms, rest room facilities, and restaurant or eating facilities at the airport were violative of constitutional guarantees of equal protection of the law. They would also inject into the case the installation of sandwich and cigarette machines, at or just prior to their arrival, which inflated the prices of merchandize vended to double what it had been. The closing of the restaurant on the day of their arrival and its opening shortly after their departure is viewed as an important factor.

These facts are, in the view of this Court, not at all significant in the legal problems involved in the charge against the appellants and the disposition of such charge by the trial court.

The municipality of Tallahassee operates in a proprietary capacity and in a governmental capacity. Among its proprietary functions is the ownership and operation of a municipal airport and supervision over the concessions there. Assuming, but not deciding, that its policies of segregation of the races in its facilities are unlawful and did constitute a violation of some duty to the appellants if enforced against them, and further assuming, without deciding, that the closing of the restaurant under the circumstances violated some duty to them, do such circumstances justify a concerted protest demonstration by appellants of their views and convictions over a protracted period of time during which tensions and tempers rise in the community which threaten to erupt into disorder and thus render the city, in its governmental capacity, powerless to terminate the demonstration in the exercise of its police power?

Stated another way, may not a lawful assembly for the purpose of protesting and demonstrating opposition to a course of policy practiced by the municipality become an unlawful assembly when pursued to unreasonable lengths imposing unreasonable burdens on others, after the lawful objectives of the demonstration had been fairly accomplished?

It is fundamental that our constitutions accord to the citizens of the United States the right of freedom of speech and of assembly and to peaceably petition for a redress of grievances. Such freedoms are jealously guarded and when exercised in good faith and in good order may not be lawfully interfered with by governmental action. However, it is not a license to take into one's own hands the enforcement of law or by excessive harassment, effect coercion and acceptance of one's convictions and interpretations of legal rights by governmental entities whose policies are in conflict. Such procedures wholly ignore the very machinery provided by the constitutions and laws of the nation and state for the declaring, securing and enforcement of

constitutional and other legal rights. It is the courts, both state and federal, to whom resort is readily available for citizens to seek recognition and enforcement of legal rights and immunities. That such courts may not move as swiftly as the individual would wish does not authorize pursuit of personal means which unnecessarily create or threaten public disturbance or disorder, or which substantially interfere with normal, orderly functions of a public facility.

Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government.

The appellants, prior to the reading of the riot act to them, had achieved their announced objectives. They had observed both at the bus station and the airport the integration or lack of it of the waiting room, rest room and restaurant facilities. They had very effectively borne witness as clergymen and otherwise of their sympathy with the struggle to obtain desegregation of the various facilities of interstate travel.

To accomodate and facilitate those legitimate objectives the law enforcement agencies of city, county and state had given protection against potential violence or other disorder from groups or individuals who resented the activities of the appellants. This protection was afforded at the bus station, at the airport on the afternoon of June 15, on the evening of June 15 when the appellants left the airport to come into town and on the following morning when they returned to the airport purportedly to take an early plane. However, instead of using the reservations they had obtained they made a cancellation. This was thrice they had made last minute cancellations of reservations for the sole reason that they wished to eat in the restaurant, which was closed. In the meantime their conduct and persistence

was arousing increased resentment and anger in the community with threats of violence and disorder toward the appellants.

Obviously, the conduct of appellants had revealed a pattern. They would make reservations for travel, wait in the lobby until just before the plane they were scheduled to take arrived and then cancel, make reservations on a later flight and then again cancel at the last minute, at all times remaining in the airport but never taking a plane. The effect is obvious. The seats and other facilities are occupied by them and their use denied to those who actually wished to travel. The use of rest rooms and wash rooms by them partakes more of lodging than a comfort feature for those whose sole purpose is some airport business. The reservation of space and last minute cancellation prevented the use of that space of the flights involved, resulting in loss and inconvenience to the air line involved and probable denial to other would-be travelers of the use of that space. The sole purpose of such a course of harassment was to goad the municipality and its restaurant lessee to open the restaurant and gratify the appellants' wishes that they be served in the style and manner they deemed to be their right.

Controversies between citizens and governmental units are not unique. In nearly every instance there is a conflict in what the citizen contends he has a right to claim and the governmental entity which would deny the validity of such claim. The citizen may freely express his views and seek to cultivate converts to them with a view of bringing moral or political pressures on the officers of the public body to accord his demands. However, such means must be exercised in a manner that is reasonable and not harmful to the rights of others or the peace and good order of the community. Especially is this true when the controversy is one of public interest in which there are strong and emotional feelings on the part of a substantial number of persons in the community.

The courts, both state and federal, are open to resolve controversies on constitutional issues in duly instituted and processed civil actions. Indeed, the very issue in the demonstrations of the appellants was subsequently presented to and adjudicated by the United States District Court for the Northern District of Florida. Brooks, et al v. Tallahassee, 202 Fed. Supp. 56. When citizens press their demonstrations in behalf of a cause (however worthy they deem their objectives to be) beyond the bounds of fully and effectively delivering their message and reach the stage that they materially and harmfully interfere with the orderly business and lawful activities of others, who are acting in public or private capacities, then the conduct is disorderly and assembly for carrying it out is unlawful. Such was the case here.

The judgments appealed from are hereby affirmed.

Affirmed. Dated this 16 day of August, 1962.

BEN. C. WILLIS
Circuit Judge

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1961

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ROBERT J. STONE, ARTHUR L. HARDGE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH LORD ROY,

Appellants,

vs.

CASE NO. 31,121

CITY OF TALLAHASSEE,

Appellee.

Opinion filed November 1, 1961

An Appeal from the Municipal Court, in and for the City of Tallahassee, John A. Rudd, Judge

Tobias Simon, Alfred I. Hopkins and Howard W. Dixon, for Appellants

James Messer, Jr., City Attorney, and Edward J. Hill, City Solicitor, for Appellee

THORNAL, J.

We have for consideration a motion to dismiss a direct appeal from the Municipal Court of the City of Tallahassee.

We must decide whether this Court has jurisdiction to consider the appeal.

The City charged that the appellants did "unlawfully assemble . . . contrary to the laws and ordinances of said City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida." A trial in the municipal court culminated in a finding of guilt and a sentence to pay a fine with an alternative term in the city jail. At the outset of the trial the appellants moved to dismiss the complaint with the contention that Section 870.04, Florida Statutes, as amended by Chapter 61-237, Laws of Florida, 1961, was being invalidly applied against them. The City Judge announced that "the statute is not unconstitutional on its face." Coming here directly from the municipal court appellants contend that the trial judge passed directly on the validity of a state statute and that we, therefore, have jurisdiction pursuant to Section 4, Article V, Florida Constitution. The appellee's motion to dismiss questions the jurisdiction of this Court to determine the matter on a direct appeal. This motion has been argued and is now here for disposition.

The appellants were charged with the violation of the municipal ordinances of the City of Tallahassee. Nowhere in the complaint were they charged with a violation of a state statute. A reference to Section 870.04, supra, as amended, will reveal that the statute condemns a riotous assembly and provides a penalty under Section 870.02, Florida Statutes. The offense described in the statute is a misdemeanor triable in the state courts. The statute does not even impliedly define a municipal offense. This distinction is important in determining our jurisdiction. It is perfectly clear that the municipal judge was not confronted by the necessity of passing directly on the validity of a state statute. The most that could be said would be that he was called upon to pass upon the validity of a municipal ordinance. In ac-

tuality, the record indicates that he was merely requested to decide that "the statute" was invalid "as applied to the appellants." The real contention asserted before the trial judge questioned the application of the statute, rather than its fundamental validity.

This Court derives its appellate jurisdiction from Article V, Florida Constitution. By Section 4(2), Article V, supra, appeals from trial courts may be taken directly to this Court from certain specified types of judgments. Among these are "final judgments or decrees directly passing upon the validity of a state statute . . . or construing a controlling provision of the Florida or federal constitution . . ." We must look to this constitutional provision as the source of our jurisdiction to entertain the instant appeal.

It is clear that the trial judge, at most, was called upon to pass upon the validity of a municipal ordinance. This is so because the appellants were charged with a violation of the municipal ordinances, rather than with a violation of a state statute. We have long ago held under Section 4(2), Article V, supra, that this Court did not have the power to entertain a direct appeal from a judgment of a trial court which merely passes upon the validity of a municipal ordinance. For purposes of determining the jurisdiction of this Court, a municipal ordinance cannot be classified as a "state statute." Armstrong et al v. City of Tampa, Fla. 1958, 106 So. 2d 407. While conceivably a municipal court could be considered as a "trial court" from which a direct appeal could come here if in some peculiar situation the municipal court passed directly upon the validity of a state statute, such is not and could not have been the instant situation. Boyd v. County of Dade, Fla. 1960, 123 So. 2d 323. Moreover, even though the appellants attempted to question the validity of the application of the cited statute, they did not in any fashion assault the fundamental validity of the statute itself. Jurisdiction comes to us by direct appeal when the validity of the statute is assaulted and

passed upon. When the problem involves the validity of the application of an otherwise valid statute, a direct appeal here is not available unless there be a final judgment or decree which construes a controlling provision of the State or federal constitutions. Stein v. Darby, et al., opinion filed October 11, 1961. In the instant case there was certainly no such construction. The final judgment of the municipal judge merely contained a finding of guilt and the assessment of the fine. Nowhere in the record is there a construction of the constitution. Armstrong v. City of Tampa, supra.

Although ordinarily motions of the type involved here would be disposed of without opinion, we deemed it appropriate to elaborate on our reasons for the future guidance of the Bar.

Finding as we do that this Court is without jurisdiction to hear the instant appeals, the motion to dismiss is well-taken. However, we will treat the motion as a motion to transfer an appeal improvidently lodged in this Court. Rule 2.1a (5)(d), Florida Appellate Rules. Under Section 6, Article V, Florida Constitution, the circuit courts have jurisdiction to hear appeals from municipal courts when they involve questions such as those presented here. It is, therefore, ordered that within five days from the filing of this opinion all papers, records, briefs and other documents, including the notice of appeal, be and the same are hereby transferred to the Circuit Court, Second Judicial Circuit for appropriate disposition. Our opinion is not to be construed as in any fashion passing upon the merits of the appeal or the sufficiency of the record, including the notice of appeal. These are matters to be disposed of by the circuit court in the exercise of its appellate jurisdiction.

It is so ordered.

ROBERTS, C. J., HOBSON, DREW and O'CONNELL, JJ., concur

APPENDIX E

STATE OF FLORIDA)
)
COUNTY OF LEON)

I, RAYMOND E. RHODES, Clerk of the District Court of Appeal, First District, State of Florida, do hereby certify that:

On October 16, 1962, I received a petition for certiorari, brief of petitioner, and certain portions of the record in a case styled ISRAEL DRESNER, et al, vs. CITY OF TALLAHASSEE, which was unaccompanied by the necessary $25.00 filing fee. Subsequent to receipt of the above, on the same day, I received a telephone call from a person who identified himself as Tobias Simon, Esquire, of Miami, Florida, who represented the petitioner. Mr. Simon's inquiry was for the purpose of determining whether or not the petition for certiorari had been received. I advised Mr. Simon that the petition had been received but had not been filed because the necessary filing fee did not accompany the petition. Mr. Simon requested that I hold the petition and that he would advise me later on that morning whether or not he wished the petition filed.

During the afternoon of October 16, 1962, I received another call from Miami from a person identifying himself as an associate in the law office of Tobias Simon, Miami. This person stated that Mr. Simon was in Court and had requested that he call me and have me to return to Mr. Simon the petition for certiorari received that morning.

Had the necessary $25.00 filing fee accompanied this case the earliest date of filing would have been the morning of October 16, 1962. This case was never filed in the office of this Court.

WITNESS my hand and seal this 7th day of November, A. D. 1962.

RAYMOND E. RHODES
Clerk First District Court of Appeal
Tallahassee, Florida

(Seal)

APPENDIX F

870.02, Florida Statutes, 1961, provides as follows:

870.02 UNLAWFUL ASSEMBLIES.—If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months, or by fine not exceeding five hundred dollars.

870.04, Florida Statutes, 1961, provides as follows:

870.04 MAGISTRATE TO DISPERSE RIOTOUS ASSEMBLY.—If any number of persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in any county, city or municipality, the sheriff or his deputies, or any constable or justice of the peace of the county, or the mayor, or any commissioner, councilman, alderman or police officer of the said city or municipality, or any officer or member of the Florida highway patrol, shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the state command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present being so commanded to aid and assist in seizing and securing such rioter or persons so unlawfully assembled, or in suppressing such riot or unlawful assembly, refuses or neglects to obey such command, or, when required by such officers to depart from the place, refuses and neglects to do so, he shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly.

Tallahassee City Code, § 23-38, provides as follows:

Sec. 23-38. STATE MISDEMEANORS.

It shall be unlawful for any person to commit, within the corporate limits of the city, any act which is or shall be recognized by the laws of the State as a misdemeanor, and the commission of such acts is hereby forbidden.

Whosoever shall violate the provisions of this section, upon conviction thereof, shall be punished by the same penalty as is therefor provided by the laws of the state, but in no case shall such penalty exceed a fine of five hundred dollars, or an imprisonment for more than sixty days, or both such fine and imprisonment in the descretion of the municipal judge.